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Supreme Court of the United States

EARL TUNGET - - - - - - - - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - - Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

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Supreme Court of the United States

EARL TUNGET ..... *Petitioner*

VS.

COMMONWEALTH OF KENTUCKY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

JURISDICTION

Respondent at the outset of this brief must take issue with the Petitioner's statement that any constitutional question or any violation of the Federal Constitution was raised by Appellant until the judgment had been affirmed by the Court of Appeals. It was on petition for rehearing that an issue was raised of violation of Article IV, Section 2 of the Constitution of the United States, or Amendment XIV, Section 1, of the Constitution. This is a pure afterthought in an attempt to raise a Federal question. Little need be said of the first alleged violation, to-wit:—of

Article IV, Section 2, wherein citizens of each State are entitled to privileges and immunities of citizens of the several states. The theory, or rather, statement of the petition and brief, that Kentucky is the only State which has permitted the shackling of a prisoner during a trial, wherein the court exercised its discretion to permit same and is a precedent universally denied in other States, shows that Petitioner's attorneys have not investigated the authorities on this question. It is the universal rule above in text and precedent that the shackling of a prisoner during a trial is within the sound discretion of the trial court. While it is an extraordinary proceeding as in this case, when the facts authorize and justify, it is done, and the courts have upheld it in numerous cases.

As to the violation of the Amendment XIV of the Federal Constitution which prohibits a State from depriving any person of life, liberty or property without due process of law, this section of the Federal Constitution was not violated in this case, and the conclusion of the Petitioner in his brief and petition that the right of a prisoner tried to be free from shackles is an inherent and fundamental right is not sustained by authority, but the law is to the contrary where the prisoner's record justifies the trial court in keeping the prisoner handcuffed. As we said above, this claim of violation of the Federal Constitution was raised for the first time in the petition for rehearing and was an afterthought after the Kentucky Court of Appeals had affirmed the conviction.

This case does not involve a violation of equal protection of the law nor due process as guaranteed by the Federal Constitution, and for the above reason we respectfully submit that this Court has no jurisdiction of this matter under the record.

ISSUES RAISED AND OPINION OF KENTUCKY COURT

The only issue raised upon Petition for Writ of Certiorari is the alleged error of the lower court and its affirmance by the Kentucky Court of Appeals in keeping the Petitioner handcuffed during the trial, and in order that this Court may see the reasons assigned by the Court of Appeals in affirming the judgment and denying this alleged error, we will quote from the opinion the matter pertinent as follows:

> "A. Was it reversible error to keep appellant in handcuffs during the trial? As a general rule, we would condemn such a practice. A court would hardly be justified in permitting this to be done in one murder case out of an average hundred coming to trial. However, we have heretofore announced the rule to be that of permitting shackles on defendants during trials in exceptional cases, in cases where the trial courts appeared to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials. See the cases of Marion v. Commonwealth, 269 Ky. 729, 108 S. W. (2d) 721; Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390. It appears to be the generally prevailing rule in many jurisdictions of this country that trial courts will be upheld in their exercise of thoroughly sound and reasonable discretion in the matter of keeping certain defendants in shackles during their trials. See 14 Am. Jur. 855. And now applying this rule of sound discretion, exercisable in exceptional cases, to our trial now under consideration, we perceive that Tunget was a man of demonstrated desperation. He had already been convicted of murder and had been given a life sentence. Before he had served a year of the time necessary to qualify him for a parole, he had procured a gun from the outside and in nerveless fashion had herded four stalwart guards into his own cell. Thereafter, he had shot and killed the associate warden and had then shot at or through two other guards in pursuing his raging, reckless intent to escape, regard-

less of the resulting consequences. Confinement had not curbed him, courtroom solemnity had not cowed him, armed guards had neither daunted nor discouraged him. *Therefore, this appears to have been an exceptional case and we are not prepared to say that the trial court abused sound discretion in keeping handcuffs on Tunget during the trial. If this was not an exceptional case, then we would hardly know how to recognize one. But again we say that ordinarily this practice should not be followed and usually it would be condemned by this court.*" (Emphasis ours) . . . . .

"As humanitarians, we would gladly give this young man another chance, although he has already had more than one chance. As a judicial body, we are concerned only with the fairness of his trial. We perceive that he had the benefit of skilled counsel, the opportunity to testify in his own behalf, the right of procurement of his own witnesses, the right to face his accusers at the trial, the right to select his own jury from among his peers, the opportunity to submit his theory of innocence to that jury for their decision. So far as we can ascertain, he has had his full day in court and he has also had a fair trial, possibly not entirely free from error, but substantially so and, as we believe, entirely so in the category of those errors known as prejudicial."

The above quotation from the opinion shows what a desperate character the Petitioner is and that the decision of the lower court as shown by the record "for the purpose of safety and to preserve order it is best for him to remain in handcuffs" was a correct and proper ruling under the facts.

We may add in addition to what the opinion of the Court of Appeals of Kentucky stated as above quoted, that the record establishes by the Petitioner's own evidence including his expert, that the Petitioner had a fixation or obsession amounting to a mania of escape, and his actions previous to this trial authorized the lower court in keeping this desperado in handcuffs during the trial. It was a

matter of a sound discretion in the lower court, and that the lower court did not abuse this sound discretion, this Court can readily see by reviewing the record.

Here the Petitioner is a man who has been convicted and given a life imprisonment for murder and was incarcerated in the Eddyville penitentiary for life. This was in April, 1945. Within eight months thereafter he procures a pistol, presumably through the assistance of his wife, and when the guards come to his cell, having learned of his procurement of a pistol, he forces them at the point of this pistol to let him out of the cell, then locked the cell on the guards, and when the assistant warden, Gumm, was approaching, he deliberately murdered him, and then also shot at another guard, who, however, overpowered him.

The record shows by the evidence of another prisoner, that he said "if he threw the pistol on Gumm and he did not open the gate and let him out, he would shoot hell out out of him." This was the day preceding the murder of Gumm, and that he was a desperate character without conscience, cold-blooded and cruel, is shown by his actions in this case. That the lower court acted right and for the protection of the court officials, spectators and the court's work cannot be questioned under the facts in this case, and the Court of Appeals of Kentucky recognized that the lower court exercised its discretion properly and soundly.

ARGUMENT AND AUTHORITIES

This Court will note in reading the petition and the brief that the petition on page 7, predicates its assignment of error on the trial court's abuse of discretion in refusing to sustain the motion made by Petitioner to be relieved of shackles. While in the brief on pages 22 and 23, it is argued "that the right to be tried free from shackles is so fundamental in due process that a refusal of the right is a denial of due process", and further, on page 23, that the

Petitioner had an "inherent and fundamental right" to be tried free from shackles.

This is far from the law in the matter and the inconsistency of the petition and brief can be readily noted by this Court. If it is a matter of discretion with the court, certainly it could not be a fundamental and inherent right. The whole argument in Appellant's brief on the trial before the Court of Appeals of Kentucky was based on the alleged abuse of discretion in keeping the prisoner manacled.

That we are right in our statement that this is a matter addressed to the sound discretion of the trial court, we will quote from 23 Corpus Juris Secundum, page 313, Section 977 (Criminal Law) as follows:

> "Shackling accused. During the trial accused should be free from shackles, except in so far as the trial court, in its sound discretion, deems them necessary to prevent the escape of accused or his forcible release, to restrain him from doing violence to others, or from injuring himself, or to prevent such misconduct as would obstruct the work of the court; and such exceptions apply particularly while accused is being brought into or taken from court."

The Kentucky Court of Appeals held that the lower court did exercise a sound discretion and the quotation from the opinion so shows. That this is the universally recognized rule in all jurisdictions we will now quote from a number of authorities of other States.

One of the leading cases is McPherson v. State, 178 Ind. 583, 99 N. E. 984, wherein the court said:

> "It has been held, however, that whether it is necessary for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge."

This quotation is supported by authorities cited from fourteen States and two leading text book authorities, Bishop and Wharton.

There is nothing in the record to show in this case that the trial judge in view of this prisoner's character and record abused his discretion and the law on this particular point is set out in State v. Allen (W. Va.), 38 S. W. 239, as follows:

> "When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed."

Again quoting State v. Hanrahan, 207 N. W. 224, 49 N. D. 434, the Supreme Court of North Dakota said:

> "It is the universal rule that while no unreasonable restraint may be exercised over the defendant during the trial, yet it is in the discretion of the trial court to determine what is and what is not reasonable restraint."

Coming now to the State of Kentucky where this principle of law and rule is recognized, we will quote from Marion v. Commonwealth, 269 Ky. 729, 108 S. W. (2d) 721, as follows:

> "Whether defendant should be shackled in court to prevent escape or protect others from attack by defendant rests on the discretion of the court based on reasonable grounds of apprehension."

This Court will note that in the Kentucky case of Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390, which was decided some twenty years previous to the above case of Marion v. Commonwealth, the Court of Appeals of Ken-

tucky recognized the right of discretion of the lower court in these matters and based its decision in this Blair case "under the circumstances as appear to have attended the handcuffing" in that case.

We will go further. In the case of Hall v. State, 199 Ind. 292, 159 N. E. 420, which in facts is somewhat similar to the Petitioner's case, the Supreme Court of Indiana held as follows, quoting syllabus:

> "Where record showed that defendant, accused of murder while engaged in robbery, attempted to escape prison once, and his codefendant did escape, that defendant secured revolver while in prison, and shot it, directed at sheriff, and, for reason that effort might be made to release him during trial, refusal to sustain his motion objecting to shackling him during trial, because it infringed his rights, under Const. art. 1, sec. 13, 15 (Burns' Ann. St. 1926, Sec. 65, 67), to fair trial, and guaranty against treatment with unnecessary rigor, was within trial court's discretion."

Now in answer to the claim that the facts authorizing the court's order to keep the prisoner in handcuffs must appear at the trial, we will cite and quote to this Court from the opinion of Pierpont v. State, 49 Ohio App. 77, 195 N. E. 264, as follows:

> "While the appellant admits that the necessity for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge, as decided by the court in McPherson v. State (1912) 178 Ind. 583, 99 N. E. 984, he maintains that there must be some evidence offered to the court at the trial of imminent danger of escape or violence to others, based upon the conduct of the prisoner at the time of the trial, to authorize the court to exercise its discretion to require physical restraint of the prisoner, and cites State v. Kring (1877) 64 Mo. 591, and State v. Williams (1897) 18 Wash. 47, 50 P. 580, 39 L. R. A. 821, 63 Am. St. Rep. 869."

"In that case the court also held that it was not necessary that the court's action be based wholly upon matters that occurred at the trial, and this would seem to be the better rule. We quote again from the opinion, 199 Ind. at page 603, 159 N. E. 420:

"Appellant's contention that knowledge upon which a court bases its discretion to refuse a prisoner's request that fetters be removed from his legs must come only from evidence offered at the trial does not appear to us to be sound."

All the authorities seem to state that there is an exception to the rule that the defendant must not be shackled, handcuffed, or bound during trial where there is evident danger of escape or rescue. Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390."

From the above quotations from authorities of other States, this Court can readily see that the statement in Petitioner's brief that the universal rule except Kentucky denied shackling, is unauthorized, and the law is exactly to the contrary. Every case cited in the Petitioner's brief predicates the denial upon the grounds that there was no "pretense of necessity for such restraint" as in the California case cited, or no "evident necessity" as in other cases cited. Even the Petitioner's authorities recognized the rule that the court has discretion in this matter and when there is evident, or in its judgment reasonable necessity for the shackling, it is permitted. The brief goes to the extremity of arguing that this denies a resident of Kentucky equal protection of the law which is accorded in all the other States when as we have shown above, all text writers and States recognize the principle of shackling under the circumstances of each case, and a sound discretion exercised in the matter. That this trial of Appellant did not violate his rights to due process, we refer back to the quotation from the opinion of the Kentucky Court of Appeals conclusively showing that his trial was a fair trial. That this was a cold-blooded and premeditated murder to escape cannot be questioned, and it makes no difference

how many trials this man has, he is guilty of this willful and premeditated murder and deserves the punishment inflicted. He had no defense to this case except a claim of mental abortions when the facts in this case showed a premeditation and determination to shoot his way out of the penitentiary irrespective of the consequences.

CONCLUSION

Respondent, the Commonwealth of Kentucky, therefore respectfully submits that the raising of a Federal question in this case as was done on petition for rehearing is an afterthought, and furthermore, that this has no basis under the two alleged provisions of the Constitution relied on. We further respectfully submit that the action of the lower court and its affirmance and approval by the Kentucky Court of Appeals was proper, and certainly the court who knew the facts and knew the desperate character of the Petitioner was a better judge of the reasonableness and propriety of his order than an Appellate Court, and it is a universal rule unless there is a flagrant abuse of discretion, the Appellate Courts will not interfere with the discretion of the trial court. And as the Court of Appeals of Kentucky said in its opinion, "if this was not an exceptional case, then we would hardly know how to recognize one." We, therefore, respectfully ask that Petition for Writ of Certiorari be denied.

Respectfully submitted,

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